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No. 93-5209

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DARREN J. CUSTIS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

REPLY BRIEF OF MR. CUSTIS

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The Respondent agrees that certiorari should be granted with respect to Question No. 1. Therefore, this Reply addresses Respondent's arguments only with respect to Question No. 2, whether attempted breaking and entering is a violent felony for purposes of sentencing enhancement under the Armed Career Criminal Act.

1. Respondent acknowledges, as it must, that there is a circuit conflict on Question No. 2. The court of appeals for the Fourth Circuit specifically acknowledged that circuit conflict, pointing out that the Fifth and Tenth circuits have held that attempted burglary does not qualify as a violent felony for section 924(e). App. at 10a; see United States v. Martinez, 954 F.2d 1050 (5th Cir. 1992)(acknowledging contrary holding in Sixth Circuit); United States v. Strahl, 958 F.2d 980 (10th Cir. 1992). The Fourth Circuit expressly joined three circuits which have reached the opposite conclusion. App. 10a; see United States v. Lane, 909 F.2d

895, 902-03 (6th Cir. 1990), cert. denied, 498 U.S. 1093 (1991); United States v. O'Brien, 972 F.2d 47, 52 (3rd Cir. 1992), petition for cert. pending (acknowledging split in the circuits); United States v. Payne, 966 F.2d 4, 8-9 (1st Cir. 1992)(acknowledging contrary holding in Fifth Circuit).

Despite the manifest confusion among the lower courts, Respondent suggests that certiorari should not be granted, characterizing Mr. Custis' argument as being merely that the court of appeals misread the Maryland law of attempt. That characterization is incorrect. The circuit conflict has arisen not because of the vagaries of state law, but because the courts of appeals have not uniformly applied the categorical approach required by Taylor v. United States, 495 U.S. 575 (1990). Taylor held that section 924(e) "mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." Taylor at 600. This categorical approach is designed to ensure uniformity and avoid a sentencing scheme in which "a particular crime might sometimes count towards enhancement and sometimes not, depending on the facts of the case." Id. at 601.

The courts of appeals have diverged in interpreting this standard. Some courts, such as the Fifth and Tenth Circuits, have examined the elements of the offense to determine whether the offense by its nature (i.e., in every case) poses a serious potential risk of physical injury to another. These courts have concluded that attempted burglary does not pose such a risk,

primarily because entry is not an element of the offense. United States v. Martinez, 954 F.2d 1050, 1053-54 (5th Cir. 1992); United States v. Strahl, 958 F.2d 980, 985-86 (10th Cir. 1992).

Other courts, including the court below, have failed to apply the categorical approach. The Fourth Circuit did not examine the statutory elements of attempted breaking and entering; instead the court relied on its belief that "[i]n most cases, attempted breaking and entering will be charged when a defendant has been interrupted in the course of illegally entering a home." App. 10a (emphasis supplied). The Fourth Circuit's opinion directly violates the categorical approach of Taylor.

Thus, petitioner's argument is not that the court of appeals misinterpreted Maryland law, but rather that it entirely failed to examine state law in the manner Taylor requires. The Fourth Circuit's ruling on this issue has implications extending well beyond the borders of Maryland. Based solely on the reasoning of Custis, the Fourth Circuit recently held that attempted burglary under New Jersey law qualifies as a violent felony under section 924(e). United States v. Thomas, __ F.2d __, slip. op. at 3, 1993 Westlaw 317076, 1993 Lexis 21459 (4th Cir. August 23, 1993). In Thomas, the court again failed to follow the categorical approach, and did not examine the statutory elements of the New Jersey statute. This approach is directly contrary to the analysis mandated by Taylor.[1]

[1] Similarly, the Sixth and Third Circuits have misapplied Taylor in examining whether attempted breaking and entering and attempted burglary count as violent felonies under section 924(e).

Respondent is incorrect in stating that review would not ensure the uniformity of federal law. Twenty four states have adopted some form of the Model Penal Code substantial step test for attempts, and ten federal circuits have also adopted the substantial step test. Young v. State, 303 Md. 298, 314, 493 A.2d 352, 361 (1985)(compiling cases and statutes). Review in this case would establish a uniform rule for federal courts reviewing prior attempt convictions from these jurisdictions.

2. Respondent also claims that Question No. 2 is not worthy of review because, if Mr. Custis prevails on the issue, he might still be eligible for an enhanced sentence on remand based on a 1981 finding of juvenile delinquency. This argument is meritless. The government never attempted to rely on the finding of juvenile delinquency as a predicate conviction in the district court. Instead, it expressly relied on other convictions. The government attempted to raise this issue for the first time before the court of appeals. However, the court below did not rule on whether the alleged act of juvenile delinquency qualifies under section 924(e). Accordingly, the government's argument shows at most that remand might be necessary if this Court ultimately ruled in petitioner's favor. The same can be said of most cases this Court reviews.

The Sixth Circuit focused on the elements of the completed crime of burglary, rather than the elements of attempted burglary. Lane, 909 F.2d at 903. The Third Circuit in O'Brien, 972 F.2d at 53, examined the defendant's actual conduct, which is directly contrary to Taylor because it makes enhancement depend on the facts of the prior case.

It is unlikely, however, that a remand would be necessary. An act of juvenile delinquency does not count for enhancement under the ACCA unless there is a "finding that a person has committed an act of juvenile delinquency involving a violent felony." 18 U.S.C. section 924(e)(2)(C). There was no such finding in Mr. Custis' case. Thus, it is clear that the 1981 delinquency finding does not count as a prior conviction under section 924(e).[2]

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted with respect to both questions presented.

Respectfully submitted,

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September, 1993

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[2] Respondent is mistaken in asserting that Mr. Custis did not argue in the court of appeals that the delinquency finding does not qualify as a violent felony under the ACCA. Resp. Brief at 19 n.13. Mr. Custis expressly argued, inter alia, that the delinquency finding was not a violent felony. Mr. Custis C.A. Reply Br. at 12.

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the Reply Brief for Darren J. Custis, was mailed, first class postage prepaid, this 24th day of September, 1993 to The Solicitor General, Department of Justice, Washington, D.C. 20530.

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